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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-495

ROSENELL SUSI, MAE DIANA,
Petitioners

v.

STATE OF OHIO,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

In addition to the opinions set forth in the petition, respondent adds *In Re Susi*, 38 Ohio App. 2d 73 (1973), and attaches as Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION OF LAW PRESENTED

WHERE ACCUSED IS CHARGED WITH TWO DISTINCT CRIMINAL OFFENSES, (A MISDEMEANOR AND A FELONY), AND IN A TRIAL OF THE MISDEMEANOR CHARGE WITHOUT

THE FELONY, ACCUSED IS FOUND GUILTY OF THE MISDEMEANOR, DOES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BAR PROSECUTION OF THE FELONY, WHERE THE ARREST AND FACTUAL PATTERN ARISE OUT OF THE SAME TRANSACTION OR OCCURRENCE.

STATEMENT OF THE CASE

The statement of the case is adequately set forth in the petition.

ARGUMENT

WHERE ACCUSED IS CHARGED WITH TWO DISTINCT CRIMINAL OFFENSES, (A MISDEMEANOR AND A FELONY), AND IN A TRIAL OF THE MISDEMEANOR CHARGE WITHOUT THE FELONY, ACCUSED IS FOUND GUILTY OF THE MISDEMEANOR, DOES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BAR PROSECUTION OF THE FELONY, WHERE THE ARREST AND FACTUAL PATTERN ARISE OUT OF THE SAME TRANSACTION OR OCCURRENCE.

The Supreme Court of Ohio properly notes in their opinion in the present case that the doctrine enunciated in *Ashe* v. *Swenson*, 397 U. S. 436 (1970) only comes into effect when the accused is found not guilty in the first prosecution.

> "First, the doctrine of collateral estoppel is not applicable to this case. Collateral estoppel provides that one who has been adjudged not guilty of a criminal charge may not be tried thereafter upon

> a separate charge arising out of the same event or occurrence. In the present case, the appellants were not acquitted in the initial trial, but convicted."
> (Petitioners' Brief, page 9)

Petitioners here have been charged with two distinct offenses: (1) permitting a room to be used for gambling, a misdemeanor in violation of Revised Code 2915.01, and (2) possession of numbers game tickets, a felony, in violation of Revised Code 2915.111. They were convicted of the misdemeanor charge in the Municipal Court of Franklin County. The Double Jeopardy Clause, however, does not bar their prosecution for the felony charge before the Franklin County Court of Common Pleas when the latter is a distinct criminal offense.

With respect to the Double Jeopardy claim by petitioners, the Supreme Court of Ohio notes in their opinion:

> "Second, neither the United States Supreme Court, nor this court, has determined the so-called same transaction test, enunciated by Justice Brennan in his concurring opinion in *Ashe*, to be an essential Fifth Amendment guarantee. See Justice Harlan's concurring opinion, at page 448 of *Ashe*, *supra*; *State* v. *Ferguson* (1964), 175 Ohio St. 390, 394. We adhere to the mandate of the United States Supreme Court in this regard."
> (Petitioners' Brief, page 9)

Finally, petitioners rely on *Waller* v. *Florida*, 397 U. S. 387 (1970) in respect to the multiple prosecution issue. It is respectfully noted that the facts in *Waller* involved prosecution and conviction of the identical offense first in a municipal court followed by conviction in a state court.

Waller held that a conviction in the municipal court barred prosecution in a state court for the identical offense, at page 395.

CONCLUSION

Respondent respectfully notes that because petitioners are charged with two distinct criminal offenses, the Double Jeopardy Clause of the Fifth Amendment has not been offended where petitioners have been convicted of the misdemeanor charge, and prosecution is continuing on the felony.

It is, therefore, submitted that the within cause presents no question which warrants further review by this Court and that the petition for a writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alan C. Travis, counsel for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the_____day of October, 1975, I served three copies of the foregoing printed Brief in Opposition to Petition for Writ of Certiorari, be maling a copy in a duly addressed envelope, with first class postage prepaid to Mr. Thomas M. Tyack, 536 South High Street, Columbus, Ohio 43215. I further certify that all parties required to be served have been served.

ALAN C. TRAVIS
Counsel for Respondent

APPENDIX "A"

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

NO. 73AP-384

In the Matter of the Complaint For a Writ of Habeas Corpus For Rosenell Susi and Mae Diana.

DECISION

Rendered on November 27, 1973

TYACK, SCOTT & COLLEY,
MR. THOMAS M. TYACK
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For Petitioners Rosenell Susi and Mae Diana

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For Respondent George C. Smith

PER CURIAM.

This original action in habeas corpus is before this court upon the motion of respondent, George C. Smith, Prosecuting Attorney, to dismiss the complaint upon the grounds that it fails to state a cause of action in habeas corpus. Respondent also contends that he is not a proper party from whom the petitioners should seek relief.

Petitioners rely upon *Owens v. Campbell* (1971), 27 Ohio St. 2d 264, in support of their contention that they have properly brought this action. The syllabus of that case reads as follows:

> "The extraordinary original jurisdiction granted to an Ohio appellate court may be invoked to adjudicate the right of an accused to the benefit of the doctrine of collateral estoppel, made applicable to the state as being within the federal constitutional right against double jeopardy by *Ashe v. Swenson*, 397 U. S. 436."

While *Owens* was brought in habeas corpus, the Supreme Court made no reference thereto in the syllabus but rather referred to "the extraordinary original jurisdiction" of the Court of Appeals. This is significant in light of the statement in the opinion by Justice Schneider at page 267-268 that:

> "Rather than affirm the trial court on the ground of lack of a proper nominal party or *for failure of appellant to label correctly his invocation of the Court of Appeals' proper original jurisdiction*, we reverse the judgment entered by it * * *." (Emphasis added.)

It is not clear as to which of the five original writs the Supreme Court felt was proper. It may well have been prohibition inasmuch as Justice Schneider also observed at page 267, "* * * we do not fear that any officer or judge would consider himself not bound by the adjudication by reason of his absence or a direct party hereto."

As to prohibition, the Supreme Court held in the *per curiam* opinion in *State, ex rel. Woodbury, v. Coller* (1972), 31 Ohio St. 2d 195, that:

> "A writ of prohibition is sought to prevent appellee Daniel T. Spitler from proceeding with the prosecu-

> tion of the appellants' criminal cases. *Prohibition will not lie as to a prosecutor* who is duty bound to proceed to prosecute pursuant to indictment. * * *" (Emphasis added.)

Since here, as in *Owens*, the basic relief sought by petitioners is not to be prosecuted upon an indictment returned charging them with a criminal offense, upon the grounds of collateral estopped, it would appear that prohibition is the proper remedy (although it might be mandamus or procedendo) inasmuch as Justice Schneider stated at the conclusion of his opinion that both the court of common pleas and the prosecuting attorney were bound to dismiss the indictments. See *State, ex rel. Russell v. Perkins* (1973), 34 Ohio St. 2d 48, wherein prohibition was used to raise the issue of collateral estoppel. Although, as indicated in the opinion in *Owens*, the prosecuting attorney is the proper *counsel* to defend the action we do not feel he is a *proper party*, especially in view of *Woodbury*. Since he is the sole party respondent, there is no proper party. In *Owens* there was a proper party respondent named although there were indications that further proper parties should have been named.

From petitioners' petition and attached memorandum, it appears that they contend they were tried in Franklin County Municipal Court on March 6, 1972, on charges of keeping a house for gambling purposes in violation of R. C. 2915.01. They further contend that "based upon the same identical transactions, occurrences or series of events" an indictment has been returned charging them with a second offense of "possession of numbers." While the statutory reference made by petitioners is R. C. 2915.11, we assume they intend R. C. 2915.111, which is the section prohibiting possession of tickets, orders, or

devises representing an interest in a scheme of chance known as the "numbers game." R. C. 2915.11 prohibits the manufacture, printing, selling, and other disposition of such devices.

R. C. 2915.01 prohibits the keeping of a place (room, building, etc.) to be used for gambling or knowingly permitting it to be used, or renting it to be used.

A comparison of R. C. 2915.01 with R. C. 2915.111 indicates that a person could easily be found not guilty of a violation of R. C. 2915.01, but guilty of a violation of R. C. 2915.111 even upon the same transactions, occurrences, or series of events. The same would be true if R. C. 2915.11 were involved. Thus, the identical offense is not involved, and there can be no double jeopardy in that sense. However, with respect to collateral estoppel, *Ashe v. Swenson* (1970), 397 U. S. 436, 90 S. Ct. 1189, requires a court to examine the record, including the pleadings, evidence, charge, and other relevant matter, and determine whether a rational jury could have grounded its verdict upon an issue other than the ones which the accused seeks to preclude from consideration. It is difficult to preceive how an acquittal upon a charge under R. C. 2915.01 could have been predicated upon a determination that there was no "possession of numbers."

Nor is there any such contention made in that which petitioners have filed. We are even unable to ascertain whether petitioners were found guilty or acquitted of the charge under R. C. 2915.01.

Petitioners merely state they were tried on that charge on March 6, 1972. However, respondent in his memorandum refers to a "conviction under R. C. 2915.01."

The doctrine of collateral estoppel applies only where there has been a finding of not guilty in a trial upon one criminal offense in which the rationally conceivable issues in dispute determined in favor of defendant are also issues in dispute in another separate and distinct criminal offense arising out of the same circumstances with which the same defendant is charged. The state is precluded from litigating a second time the issues found adversely to it upon the trial of the first offense. However, collateral estoppel is not applicable where there has been a conviction of the first offense tried. Collateral estoppel does not apply against the state since the issues were not found adversely to it. Here we have separate and distinct offenses even though they may have arisen out of the same occurrences or series of events.

Petitioners have set forth no allegations which, if proved, would establish a claim for relief pursuant to the doctrine of collateral estoppel regardless of which extraordinary original remedy in this court is involved.

They contend they have complied with R. C. 2725.04. However, though they state that a copy of the indictment is attached to their application, we find none so attached. They have not complied with R. C. 2725.04(D). We find no "copy of the commitment or cause of detention" or facts setting forth why their claimed detention is without legal authority. A copy of an indictment standing alone does not indicate detention but only the charge. Detention would result from other actions before or after the return of the indictment, or both.

For the foregoing reasons, the motion to dismiss is sustained, and this action is dismissed.

STRAUSBAUGH, HOLMES and WHITESIDE, JJ., concur.